(3)

No. 04-209

Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

KAROL K. HOWARD,

Petitioner,

v.

COLUMBIA PUBLIC SCHOOL DISTRICT, JAMES R. RITTER, AND CHERYL COZETTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

JOSEPH Y. DECUYPER, JR.
Counsel of Record
401 N.W. Englewood Road,
Suite 120
The Englewood Court Building
Kansas City, MO 64118
(816) 453-6100

KAREN HOWARD
851 N.W. 45th Street,
Suite 306
Corporate Hills North
Kansas City, MO 64116
(816) 453-3119

Counsel for Petitioner

October 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reply Argument 1

I. Petitioner's Causation Arguments made in her Petition for Writ of Certiorari have been preserved and are properly before this Court 1

II. This Court's Review is warranted because the Conflict between the Eighth Circuit and Other Circuit Courts is real and the Conflict is Intolerable 3

III. The Factual Premises on which Petitioner bases her Causation arguments are supported by the Evidentiary Record which was presented to the Lower Courts 6

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Brennan v. Norton, 350 F.3d 399 (3rd Cir. 2003) 5

Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001) 8

Hill v. Lockheed-Martin Logistics Management, Inc., 354 F.3d 277 (4th Cir. 2004) 5

Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004) 4

Marquez v. Bridgestone/Firestone, Inc., 353 F.3d 1037 (8th Cir. 2004) 7

Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985) 1

Roberts v. Van Buren Public Schools, 773 F.2d 94 (8th Cir. 1985) 1, 6

St. Louis v. Praprotnick, 485 U.S. 112 (1988) 3

Stever v. Independent School District, 943 F.2d 845 (8th Cir. 1991) 1, 6

Vance v. Terrazas, 444 U.S. 252 (1980) 2

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 3

FEDERAL STATUTES

42 U.S.C. §1983 ..... 1, 3, 4, 5

FEDERAL RULES

Fed.R.Civ.P. 56(e) 6, 8

Fed.R.Evid. 801(C) 8

REPLY ARGUMENT

I. Petitioner's Causation Arguments made in her Petition for Writ of Certiorari have been preserved and are properly before this Court.

Petitioner's causation arguments were squarely presented to the lower court in Petitioner's written briefs, during oral argument before the lower court and in Petitioner's Petition for Rehearing.[1] In Petitioner's brief to the Eighth Circuit (p. 20), Petitioner argued she had "presented sufficient evidence to create a triable issue of fact on her 42 U.S.C. §1983 claim in that the alleged "interpersonal friction" is inextricably linked with Howard's speech which is a disputed fact precluding summary judgment." Petitioner's counsel also argued this issue to the lower court in oral argument. Further, in her Petition for Rehearing (pp. 5-7), Petitioner once again addressed the question of motivation by first stating the issue, "Whether interpersonal friction arising from a public employee's speech (cause-and-effect) can justify an adverse action because it is inextricably linked with her protected speech and does it create genuine issues of material fact precluding summary judgment on a public employee's First Amendment claim under 42 U.S.C. §1983?", and then presenting argument on the issue. The same case law cited in Petitioner's Petition for Writ of Certiorari is the same case law Petitioner cited to the lower court. *Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991); *Roberts v. Van Buren Public Schools*, 773 F.2d 94 (8th Cir. 1985); and *Patterson v. Masem*, 774 F.2d 251 (8th Cir. 1985). The lower court did not address the issues raised by Petitioner.

It is important to note that the two questions presented to the Court in Petitioner's Petition for Writ of Certiorari are interrelated with one another. Both questions involve

---

[1] Contrary to Respondents' inaccurate assertion, Petitioner addressed causation at the District Court level in her Suggestions in Opposition to CPS' Motion for Summary Judgment, Response to CPS' Statement of Facts, and in her Reply Brief.

the extent the employer's motive predominates when the adverse employment decision is inextricably linked to the employee's exercise of free speech. In this case, it is Petitioner's exercise of free speech which is inextricably linked to the subordinate teachers' complaints, said complaints which substantially influenced Ritter and Cozette to take adverse employment action against Petitioner.

Further, Petitioner consistently stated and presented evidence to the lower court that the decision to remove her from the Lee principal position was because teachers who did not like and were offended by Petitioner's speech, caused complaints to be made about Petitioner to Drs. Ritter and Cozette. Petitioner has consistently stated and presented evidence that it was the biased teachers' complaints, their influence, which was the critical source relied on by Ritter and Cozette for the adverse action taken against Petitioner. In Petitioner's briefs to the lower court, Petitioner presented evidence Ritter made statements to the Board that Petitioner was removed from her Lee principal position because teachers (the subordinate employees) were upset about Petitioner's speech. Petitioner also presented to the lower court a memo from Dr. Ritter to the Board, which stated the reason for the removal was the teachers' complaints. In Petitioner's Petition for Rehearing (p. 7), Petitioner argued, "Ritter, in the context of explaining to the Board the reason why he made the decision to remove Howard from Lee, told the Board that teachers were upset with what Howard was saying in faculty meetings." Dr. Ritter and Dr. Cozette admitted the influence of the teachers in their depositions by testifying Petitioner was removed due to teachers' complaints. There has been no waiver of Petitioner's right to present her issues to the Court.

Even assuming *arguendo*, the arguments were not made before the lower courts, there are exceptions in which this Court has exercised its discretionary powers to hear questions not raised below. *See Vance v. Terrazas*, 444 U.S. 252, 258-259, n. 5 (1980). This Court has held that addressing an issue which had not been raised in a petition is particularly appropriate where the question is in a "state of evolving definition and uncertainty," and is "one of importance to the

administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1089, n. 8 (1991). In *St. Louis v. Praprotnick*, 485 U.S. 112 (1988), the Court addressed an issue which had not been raised previously, for the reason it was a question which appeared "likely to recur in §1983 litigation against municipalities." *Id.* at 120. The two questions presented in this case by Petitioner, both of which involve municipal liability, are in an acute state of evolving definition and uncertainty, and manifestly need clarification from the Court. Both questions are critically important to the administration of federal law and are likely to recur in §1983 actions against municipalities.

II. This Court's Review is warranted because the Conflict between the Eighth Circuit and Other Circuit Courts is real and the Conflicts are Intolerable.

Contrary to Respondents' assertions, the conflict between the lower court's decision in this case and decisions in the other Circuit Courts is real. Petitioner cited in her Petition (pp. 19-26) numerous cases from other circuits unequivocably demonstrating an intolerable conflict exists. Respondents, however, do not actually address the conflict, but take a simplistic view in its attempt to distinguish those cases. Respondents' superficial position essentially is, that the cases from the other circuits do not demonstrate a conflict because the courts in those cases held the evidence was sufficient to create a genuine issue of fact, whereas in Petitioner's case, the evidence was not sufficient. Respondents, however, ignore the main crux of Petitioner's argument, which is, that the *types of evidence* utilized by Plaintiffs in those cases which the other circuit courts held to be sufficient to raise a genuine issue of material fact, are the same or similar to the *types of evidence* Petitioner relied on which the Eighth Circuit rejected. Such a drastic difference in the treatment of the same or similar evidence by the Eighth Circuit in this case, as compared to the other circuit courts, is what creates this intolerable conflict.

Similarly, Respondents' argument that this case is merely a "sufficiency of the evidence" case also misapprehends the issues Petitioner has raised. The conflicts of law which exist in this case among the circuits, are conflicts involving evidentiary and proof requirements which may be used to prove causation in §1983 First Amendment cases. These questions raise exceptionally important questions of federal law which are of great importance to the public citizenry. This Court's review is warranted to maintain uniformity in decisions among the circuits.

Respondents next attempt to distinguish *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004) by setting out what Respondents believe to be factual differences. Respondents' argument, however, actually highlights the factual similarities, demonstrating Petitioner's case is on "all fours" with *Love-Lane*. The similarities in the evidence are striking: Love-Lane and Petitioner were both long-time educators: Petitioner, a 22-year educator with 7 years experience as a principal; and Love-Lane, a 21-year educator, with 7 years experience as an assistant principal. Both Love-Lane and Petitioner received excellent evaluations. At Love-Lane's school there was an atmosphere of discrimination against minority students. At Petitioner's school there was an atmosphere of discrimination against minority, special needs and economically disadvantaged students. Petitioner and Love-Lane both spoke out repeatedly about the discriminatory practices in their respective schools. Teachers resented Love-Lane's speech and banded together against her. Teachers resented Petitioner's speech and banded together against her. Both Petitioner and Love-Lane continued on with their protected speech. Love-Lane was removed from her position and was demoted. Petitioner was removed from her position and demoted. The decisionmakers in Love-Lane's case relied on biased subordinates (the teachers). The decisionmakers in Petitioner's case relied on biased subordinates (the teachers). *The only difference,* and the one which creates the conflict, is that the Fourth Circuit held Love-Lane's evidence was sufficient to raise a genuine issue of fact as to whether Love-Lane was demoted in retaliation for engaging in protected speech, while in Petitioner's case, the Eighth Circuit held the

same type of evidence was not sufficient to raise a genuine issue of fact as to whether Petitioner was demoted and terminated in retaliation for engaging in protected speech. Such a conflict is intolerable.

Respondents' attempt to distinguish Petitioner's case from *Hill v. Lockheed-Martin Logistics Management, Inc.*, Case No. 354 F.3d 277 (4th Cir. 2004) (en banc) is also unpersuasive. First, the fact that *Hill* is a Title VII discrimination case does not distinguish it from this mixed-motive case because the legal standards required to prove causation to establish a claim under §1983 is identical to that required under Title VII. *Brennan v. Norton*, 350 F.3d 399, 420 (3rd Cir. 2003). Second, while Respondents state *Hill* differs because there was direct evidence of animus, Respondents, however, do not inform the Court of the direct statements of animus in this case, made by Dr. Cozette about Petitioner after Petitioner had engaged in the protected speech.[2] Third, the fact the subordinate teachers in this case do not have any decisionmaking authority does not distinguish it from *Hill*. Fourth, Respondents admit in their brief (p. 23) that a conflict does exist on the issue raised by Petitioner and by *Hill*. Fifth, in the cases Petitioner has cited in her Petition (pp. 19-26), the other circuit courts did not distinguish between whether the biased subordinates had decisionmaking authority or not. In any event, the principle of law which *Hill* has challenged in this Court, is similar to and related to Petitioner's case.

Respondents next contend there is no conflict because the lower court has already addressed the issue of the influence of a biased subordinate in a decisionmaker's decision to take adverse action against an employee. Respondents are

---

[2] In summer and fall, 2000, Dr. Cozette made statements to other principals and school district employees that "Howard would never work as a principal at Columbia Public Schools again," and "Every principal gets fired at least once in their career," and "Howard was not going to be an employee much longer," and "Howard has filed a lawsuit and would not be employed with the district next year." (App. 2311-12, 2316-17, 2625, 2634-35, 2648-49).

mistaken. The Eighth Circuit in *Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991) and *Roberts v. Van Buren Public Schools*, 773 F.2d 94 (8th Cir. 1985) did not specifically address this issue. Even assuming *arguendo*, the lower court had addressed the issue in those cases, the fact still remains that the lower court did not follow its own precedent. This is particularly disturbing because the types of evidence accepted by the Eighth Circuit in those cases as being sufficient to establish causation, is similar to the types of evidence Petitioner presented in this case. As a result of the lower court rejecting Petitioner's evidence it has disregarded its own precedent, negated those decisions, and has created a conflict with other circuits.

Petitioner has sufficiently demonstrated in her petition that the conflicts between the Eighth Circuit and other Circuit Courts are real and intolerable. Review is warranted by the Court.

III. The Factual Premises on which Petitioner bases her causation arguments are supported by the Evidentiary Record which was presented to the Lower Courts.

Respondents' characterization of Petitioner's evidence as based on "misrepresentations" or "exaggeration" is nothing more than a transparent attempt to disparage (without any legitimate basis) Petitioner's substantial evidence which is supported by the record. Petitioner's statement of facts contained in her Petition is accurate, and is supported by competent evidence admissible under Fed.R.Civ.P. 56(e). This same evidence was presented to the lower courts. Petitioner's summary of some of the evidence proving causation, including strong evidence of the substantial influence the teachers had on Ritter and Cozette and strong evidence linking Petitioner's speech to the adverse employment actions taken against her, is set out in Petitioner's Petition. (See pp. 5-14). It is significant to note that Respondents did not in their brief, dispute most of Petitioner's causation facts set out in her Petition on pages 5-14. That is because the majority of Petitioner's facts on causation are undisputed.

Respondents inaccurately state Petitioner did not provide any evidence of retaliation in her deposition other than her "belief." This is completely erroneous. Respondents ignore Petitioner's testimony where she testified: "I think my message kept getting, it got out more and more and more and it got more frequent toward the end of the year. Teachers were offended by the fact that I was talking about the minority and the disadvantaged and the special needs. They were offended by that. They didn't like what I had to say. PTA I talked about that we need to serve more of the disadvantaged students. PTA members were offended by that." (App. 1524). Petitioner also testified: "I believe what I was saying was not along the company line in terms of minority and disadvantaged students. I'm saying the minority and disadvantaged students are not getting an equitable education." (App. 1523-1525). Petitioner did talk about discrimination against minority students to Dr. Cozette. Petitioner testified she told Cozette teachers were excluding students from field trips and that it was minority children. (App. 1520). She also used the term "special needs" when speaking to Dr. Cozette. (App. 1519, 1521). As further evidence of causation, Petitioner testified in her deposition as to being treated disparately. She testified, 'Had it not been for my speech, CPS would have gone through a normal management process with me and would have given me remediation and due process like they did with everyone.'[3] (App. 1523-1525). Evidence that Petitioner was treated less favorably than other similarly situated employees is a recognized method of establishing causation raising an inference of unlawful motivation. *Marquez v. Bridgestone/Firestone, Inc.*, 353 F.3d 1037 (8th Cir. 2004).

Next, Respondents attempt to argue there is no evidence of causation because Petitioner's protected speech involved the same issues Respondents were emphasizing as to literacy and school improvement. Petitioner's protected

[3] Petitioner's summary of the evidence of disparate treatment is stated in her Petition at page 10.

speech was much more extensive and involved the discriminatory conduct of CPS employees towards minority, special needs and economically disadvantaged students. There is no evidence in this case that Respondents, nor any principal within the district, spoke out about or emphasized the same issues Petitioner was raising. Even assuming *arguendo*, Petitioner's speech was the same issue as emphasized by Respondents, Petitioner could still establish causation. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1054-1055 (6th Cir. 2001) [rejecting the school's argument that the teacher's speech impacted the "efficient operation of the school and a harmonious environment because her speech had been pre-approved by them and thus the disruptive consequences of the employee's speech traced back to the government's express decision permitting her to engage in that speech."].

Respondents also attempt to argue that there is evidence of other persons, who were not Lee teachers, who purportedly had concerns about Petitioner's communication skills. Respondents do not advise the Court that these purported "facts" were inadmissible under Fed.R.Civ.P. 56(e) and Fed.R.Evid. 801(C). Respondents also do not advise this Court that Ritter and Cozette did not have these "facts" until after Petitioner had been removed, and thus could not have relied on these "facts" when making the decision to remove Petitioner from Lee. (App. 2192, 1174A, 1159).

Respondents' last argument is that Petitioner has misrepresented facts. As stated above, Petitioner's facts are accurate and supported by the evidentiary record. There are, however, some disputed facts in this case. The disputed facts Respondents mention in their brief do not go to Petitioner's causation argument. In any event, Petitioner presented competent admissible evidence controverting Respondent's facts demonstrating genuine issues of fact existed. While Petitioner is not able to in this Reply brief address every fact Respondent claims Petitioner has misrepresented, Petitioner did present evidence demonstrating that there have been no misrepresentations. Petitioner did present evidence proving: (1) Petitioner

received excellent evaluations showing she met and/or exceeded performance requirements in aspects of her job performance; (2) Petitioner did not misrepresent the extent of the problem to Cozette. Petitioner informed Cozette of numerous teachers' resistance to literacy and school improvement; (3) Petitioner was demoted from principal to a research assistant position. It was not a promotion as Respondents infer (for the first time in this case). The position was not comparable, it was adverse. Petitioner lost her title as Lee principal, suffered a loss of status among her peers. The salary was lower. There were no job duties and a downward shift in skill level. (App. 1174, 12-4-1205); (4) Petitioner did not agree to nor did she accept the research assistant position; (5) Respondent's claim that 11 of 14 full-time teachers signed the June 10th letter is wrong. Four of the teachers who signed the June 10 letter (Altomari, Corn, Sample and Schauwecker) were not regular classroom teachers; (6) Respondent's claim that the Lee teachers/staff Brunda, Steinhubel, Rutter, James, Gilbert, Wilcoxin, Boatman, Milam and Andrews were part-time employees is inaccurate. All were assigned to Lee full-time and/or were in the Lee building every day, regularly attending faculty meetings. These teachers testified as to their observations that Petitioner had excellent communication, interpersonal and leadership skills; (7) Teachers did have influence in initiating the parent letters. One parent went to the meeting where the teachers were conspiring against Petitioner and showed her letter to them before sending it. Teacher Andre telephoned parents, including the PTA president; (8) When negotiating the principal position at Blue Ridge, Petitioner did not negotiate that she would receive paid time off to look for other employment. Petitioner expected that she would have future employment.

As to the Blue Ridge principal position vacancies, Petitioner presented evidence that Ritter and Cozette knew the teachers at Blue Ridge wanted Petitioner to be the principal. Petitioner also presented the deposition testimony of the Blue Ridge principal, who denied stating

Petitioner would not be good for the Blue Ridge principal position. He testified Petitioner should have been considered as a candidate. (App. 1081, 2598-99, 2616, 2659). Petitioner presented evidence that prior to Petitioner being assigned to Blue Ridge that Blue Ridge previously had a third elementary principal before Petitioner and that other elementary schools in the district have had three principals assigned to the schools. (App. 1073-1075, 2966, 2997). As to Respondents' argument that Howard was not qualified for the positions, Ritter, Cozette, and the HR director Mary Laffey all testified Petitioner was qualified for the positions. (App. 2103, 2188, 2196-99, 3009). Instead Respondents selected persons with less education and qualifications than Petitioner, some with no principal experience. (App. 1077-1088).

CONCLUSION

For the reasons stated in Petitioner's Petition for Writ of Certiorari and in this Reply Brief, a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

JOSEPH Y. DECUYPER, JR.
Counsel of Record
401 N.W. Englewood Road,
Suite 120
The Englewood Court Building
Kansas City, MO 64118
(816) 453-6100

KAREN HOWARD
851 N.W. 45th Street,
Suite 306
Corporate Hills North
Kansas City, MO 64116
(816) 453-3119

Counsel for Petitioner

October 2004